IN THE

Supreme Court of the United States

October Term, 1948

No. 638

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

vs.

GILMER S. MORRIS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF AMERICAN TRAIN DISPATCHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING.

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Now comes the American Train Dispatchers Association, and respectfully moves the Court for leave to file a brief as *amicus curiae* in the above entitled action, and in connection therewith represents to the Court as follows:

The issues involved in this case have a direct and vital bearing on the seniority rights of a large proportion of the workers employed on American railroads, and particularly of thousands of such workers employed in the craft or class of employees known as train dispatchers. Railroad employees in this country are almost entirely organized on a horizontal basis. Both historically and by

virtue of the provisions of the Railway Labor Act, collective bargaining agreements have been negotiated separately for each of the various crafts or classes of employees, and these agreements provide for completely separate and independent seniority subdivisions within a craft or class, based upon work classification.

Frequent questions have arisen and continue to arise with respect to the right of a returning war veteran to be reemployed in a craft or class, or seniority subdivision, different from that in which he was employed at the time of his entry into the armed forces. Such questions directly affect the rights of persons already employed in the craft or class, or seniority subdivision, to which the returning veteran seeks admission.

The American Train Dispatchers Association is a voluntary unincorporated association which represents for the purposes of collective bargaining the vast majority of train dispatchers employed by the railroads of the United States. This case involves the question of the right of a returning war veteran who was formerly employed in a different craft or class, that of telegraphers, to be reemployed, upon his return from the armed forces, in the craft or class of train dispatchers. It further involves the question of his relative seniority standing in the latter craft or class, with respect to other persons previously employed therein, and holding seniority rights as train dispatchers under a collective bargaining agreement negotiated between the American Train Dispatchers Association and the petitioner in this case.

As collective bargaining representative of train dispatchers employed by the petitioner herein, as well as those employed by most of the railroads in the United States, the said Association has been and will be faced with numerous seniority disputes similar to that here involved. Similar disputes have arisen with respect to members of other crafts

and classes of employees in the railroad industry, and have in many instances been determined by the courts in a manner contrary to the decisions of the courts below in the instant case. Unless the issues involved in this case are authoritatively determined by this Court, the American Train Dispatchers Association will be unable to advise its members and those whom it represents as to their seniority rights, and cannot properly fulfill its duties as collective bargaining representative as aforesaid. And in any decision of such issues in this proceeding, the rights of said Association and the employees whom it represents will be determined without opportunity for hearing to them unless the American Train Dispatchers Association is permitted to file a brief and express its views herein as *amicus curiae*.

Dated at Toledo, Ohio, this 16th day of May, 1949.

Respectfully submitted,

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BRIEF OF AMERICAN TRAIN DISPATCHERS ASSOCIATION AS AMICUS CURIAE

STATEMENT OF THE CASE

The facts involved in this case have already been discussed at length in briefs filed by the parties to this action, and we shall refer to them only to the extent necessary to point up what we believe to be the basic question of law presented.

At the time of his entry into the armed forces, respondent was employed by petitioner as a telegrapher, and as such his seniority rights and the conditions of his employment were fixed by a collective bargaining agreement between petitioner and the Order of Railroad Telegraphers. Under that agreement, when petitioner required additional train dispatchers, the positions were advertised for bid by the telegraphers. Telegraphers bidding on these positions were afforded the opportunity to qualify as train dispatchers in the order of their seniority as telegraphers. If the senior bidder failed to qualify, the bidder with the next highest seniority as telegrapher would attempt to

qualify, and so on until the position was filled. Qualification was accomplished by taking an examination, and then undergoing a brief training or "breaking-in" period under the supervision of regular dispatchers after which the applicant had to satisfy the chief dispatcher as to his capabilities.

While respondent was in the armed forces, several train dispatcher positions were obtained by telegraphers through this procedure. Because of his absence, respondent had no opportunity to bid on or qualify for these positions, some of which were awarded to telegraphers with less seniority as such than that of petitioner. However, when he was about to be discharged from the armed forces, petitioner was informed of and bid on a train dispatcher position then open. Upon receiving his discharge he was reemployed by petitioner in his former position as telegrapher, and approximately two months thereafter was promoted to the train dispatcher position for which he had applied, he having been the senior bidder therefor, and having qualified, by passing the required examination and, as stated in his amended complaint, by spending "in addition to his regular duties as an employee of said railway five hours each night for a period of three weeks under the supervision of a dispatcher." (R. 5.)

In accordance with the provisions of the collective bargaining agreement between petitioner and the American Train Dispatchers Association establishing the rates of pay, rules and working conditions for the craft or class of train dispatchers, petitioner accorded respondent a seniority date as train dispatcher as of August 3, 1946, the date on which he qualified for the position. Respondent contended that under the Selective Training and Service Act of 1940, he was entitled to a seniority date as train dispatcher antedating that of the telegrapher, with less seniority as such than respondent, who first obtained a train dis-

patcher's position after respondent's entry into the armed forces. This action resulted, and the courts below upheld respondent's contention.

QUESTIONS PRESENTED

Only one basic question is involved in this case. Does Section 8 of the Selective Training and Service Act of 1940* entitle a veteran, who has been restored to the same position in private employment which he left to enter the armed forces, to be given a completely different position and seniority status because he could or would have achieved that different position and status had he not entered the armed forces?

This question was answered in the affirmative by both the District Court and the Court of Appeals below. In its opinion the District Court stated:

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*The relevant portions of this section are as follows:

"Sec. 8 (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service—

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration." (50 U. S. C. App., Sec. 308, as amended.)

> "Obviously, during his military service, and because of it, it was impossible for him to take the required examination and to qualify as a dispatcher. *It is my opinion that such military service legally excused the petitioner from the non-performance on his part of the requirement to bid in the advertised vacancies filled by Middlekamp and Adkins and to qualify any sooner than he did qualify.* In order to give effect to the underlying purposes of Section 8 of the statute, we must take the view that the first vacancy occurring after his entry into military service and to which his seniority status entitled him to qualify was kept open for him until he was discharged and actually in a position to take the required examination." (R. 171; emphasis supplied.)

The Court of Appeals below took the same view, and expressly adopted the opinion of the District Court as its own opinion. (R. 188.)

It is our position that the principle thus enunciated is inconsistent with the language of the Selective Training and Service Act and any Congressional intent that may reasonably be inferred from that language. Moreover, the impact of such a principle entitling the millions of returning veterans to receive not merely their former positions, but different positions to which they would or could have been promoted had they not entered the armed forces, with retroactive seniority rights in such promoted positions, would be so widespread as to be almost incalculable.

The question thus presented is one of pressing importance, both in the railroad industry, with its long-established and often intricate systems of seniority, and in other fields of employment. And it involves a legal issue which, in view of conflicting decisions of other courts, can only be authoritatively decided by this Court.

ARGUMENT

Introduction

Although, as we have stated, we are not in accord with the principle adopted by the courts below, it is not our purpose in presenting this brief to enter into any lengthy discussion of the legal issues involved. Some reference to the issues and our position with respect to them is of course inevitable. But our primary aim will be to demonstrate the existence of what we feel to be compelling reasons for a reconsideration by this Court of its previous decision denying certiorari.

It is perhaps of primary importance to all parties concerned that there be a determination by this Court of the issues here involved, irrespective of what that determination may be. The petitioner, the American Train Dispatchers Association, and other railroads and railway labor organzations, have been and are presently involved in numerous disputes and pending or threatened litigation with respect to seniority rights asserted by returning veterans. At the present time and for some time past the principle source of such disputes in the railroad industry, and the litigation which has resulted therefrom, has been the question of promotion rights. This question has not been involved in the several cases decided by this Court with respect to the Selective Training and Service Act, and we believe that a decision in the instant case would have widespread effect as a precedent for the disposition of numerous pending disputes.

Therefore, in our argument we shall merely discuss the question involved in the light of the pertinent language of the Selective Training and Service Act, and then refer briefly to decisions which conflict with that of the Court of Appeals below and which, by reason of such conflict, war-

rant the granting by this Court of the petitioner's petition for rehearing. Several of these decisions have not previously been brought to this Court's attention in this proceeding.

I. THE LANGUAGE OF THE STATUTE

Neither the opinion of the Court of Appeals nor of the District Court below contains any reference to particular provisions of the Act upon which the decision in favor of respondent is predicated. Both courts seem to proceed on the assumption that the "underlying purposes" of the reemployment provisions of the statute were to make the veteran whole for any advantage in connection with his employment, such as opportunity for advancement to a better job, which might have been rendered unavailable to him by reason of his absence in the armed forces. They therefore held that he was "legally excused," by reason of his military service, for any delay occasioned thereby in fulfilling the requirements or achieving the qualifications necessary to obtain such advantage. In other words, he had to be restored not to his former position, but to the position he could or would have been able to attain had he not entered the armed forces.

This assumption by the courts below, that the veteran had to be "made whole" for the time and opportunities lost while he was in military service, is refuted by the express language of the statute. Section 8(b), paragraph (B), of the Act requires that in the case of a veteran who left a position, other than temporary, in the employ of a private employer, "such employer shall restore such person *to such position* . . . " Section 8(c) of the Act further provides that:

> "Any person who is restored to a position in accordance with the provisions of paragraph (A) or

(B) of subsection (b) *shall be considered as having been on furlough or leave of absence during his period of military service . . .* " (Emphasis supplied.)

This language in the statute is directly in conflict with the holding of the courts below that upon being restored to his former position as telegrapher, respondent must then be given the position and seniority status as train dispatcher which he could have attained *not* by being on "furlough or leave of absence" from petitioner's employ, but only by remaining in the active employ of petitioner, "bidding in" the dispatcher's position, and qualifying himself by passing an examination and undergoing a preliminary period of supervised training. In this case the respondent, upon his return from the armed forces, was treated exactly as if he had been on furlough or leave of absence, and it is that treatment of which he complains. In upholding his contentions the courts below said in effect that he should be treated in precisely the opposite manner, that is, as if he had actually been working for petitioner instead of being on furlough or leave of absence.

This Court has not as yet had occasion to pass upon the meaning of the portion of Section 8(c) of the Act which we have quoted above, except in cases where it was completely immaterial whether the veteran's military service was considered as time spent on furlough or leave of absence, or, to use the Court's language in the case of *Fishgold vs. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 1230, "as service in the plant." Of course, in the *Fishgold case*, the veteran's seniority, and his rights to continued employment in the event of a layoff after his return from the armed forces, would be the same in either event. But in cases such as the instant one, and other cases involving promotion rights, the distinction between a furlough or leave of absence, and service in the

plant, is vital. As Judge Hand observed in connection with the decision affirmed by this Court in the *Fishgold case,* the language in question was added to the Selective Training and Service Act by an amendment made while the bill was in Congress, so that the veteran:

> " . . . . was given the same status that he would have had, if he had been 'on furlough or leave of absence' while he was in the service. *How far that differed from his position had he remained actively at work, does not appear; but clearly the amendment presupposed that a difference there might be . . .* " (154 F. (2d) 785, 788; emphasis supplied.)

The decision in the instant case depends entirely upon whether or not the distinction referred to is to be drawn. If, in using the words "furlough or leave of absence," Congress intended to distinguish the situation of the reemployed veteran in any way from that of an employee who had remained continuously at work in the active service of his employer, then we believe the decision of the courts below to be *ipso facto* erroneous. And if Congress intended no such distinction, then in view of the widespread importance of this question, and the conflicting court decisions to which we shall subsequently refer, we submit that this matter is one which should be authoritatively decided by this Court.

II. DECISIONS OF OTHER COURTS—THE "FURLOUGH OR LEAVE OF ABSENCE TEST"

The case of *Trischler vs. Universal Potteries, Inc.,* 171 F. (2d) 707, decided December 14, 1948, by the Court of Appeals for the Sixth Circuit, and not previously brought to this Court's attention, stands squarely in conflict with the decision of the Court of Appeals below. In that case, one of the plaintiffs had been an apprentice when he en-

tered the armed forces, and claimed employment as a journeyman upon his return. The remaining plaintiffs, who had not yet obtained apprenticeships at the time of their induction, claimed the right to displace individuals who, during their absence in military service, had received apprenticeships which plaintiffs would have been entitled to receive by virtue of their seniority had they not been absent. (For detailed facts, see District Court opinion, 78 F. Supp. 609.) In affirming the District Court decision denying these claims, the Court of Appeals applied the "furlough or leave of absence" test, ruling that the veterans had failed to establish that, upon being reemployed they had not been considered as having been on furlough or leave of absence during the period of their military service.

In the case of *Spearmon vs. Thompson*, 167 F. (2d) 626, the Court of Appeals for the Eighth Circuit denied the claim of one of the plaintiffs, Delozier, to be reemployed in a mechanic's position to which he would have been upgraded, from his former position as helper, had he not entered the armed forces. Delozier's claim was predicated upon precisely the same theory as that of the plaintiff in the instant case. In denying it, the Court of Appeals stated as follows:

> "* * * Although it is stipulated that had he remained in the position of helper until November 2, 1942, he would on that date have been advanced to the position of mechanic, it is a conceded fact that he occupied the position of helper at the time of his induction. The seniority which accrued to him during the time he served with the armed forces was seniority in the position of helper and not as mechanic. Since he was restored to the position of helper upon his return, he can have no just complaint that his rights under the Selective Training and Service Act have not been fully accorded to him." (167 F. (2d) 631-632.)

It is clear that in the *Spearmon case,* the Court held that the Act did not require Delozier to be made whole for the promotion lost by reason of his absence in the armed forces. Delozier's petition for a writ of *certiorari* was denied by this Court on December 6, 1948. (*Delozier vs. Thompson,* No. 359, October Term, 1948; 93 L. Ed. (Adv.) 126.) The *Spearmon* decision has not previously been brought to the Court's attention in connection with this proceeding.

Among other cases applying the furlough or leave of absence test, and not previously relied upon by petitioner herein, are those in which the courts have held that the question of whether a reemployed veteran is eligible for vacation pay during the first year after his return depends not on whether he would have been so eligible had he remained at work instead of entering the armed forces, but on whether he would have been eligible had he been on furlough or leave of absence during the period of his military service. Among these cases are two decisions by the Court of Appeals for the Second Circuit, *Dwyer vs. Crosby Co.,* 167 F. (2d) 567, and *Siaskiewicz vs. General Electric Co.,* 166 F. (2d) 463. And in a case involving a similar question, *Seattle Star vs. Randolph,* 168 F. (2d) 274, the Court of Appeals for the ~~Tenth~~ NINTH Circuit held that time spent in the armed forces was not to be considered as time worked in private employment for the purpose of computing a reemployed veteran's severance pay. In so holding, the Court said:

> "It is argued that unless the contract be so interpreted as to permit appellees' time in the armed services to be considered as full time employment, said contract conflicts with Section 8(c) of the Selective Service and Training Act and is against public policy. Such a contention is diametrically opposed to the plain reading of Section 8(c) and gives no effect to the requirement that the determination

> shall be made on the basis of the rules applicable at the time of induction to those on furlough or leave of absence. *Feore vs. North Shore Bus Co., Inc.*, 2 Cir., 161 F. 2d 552." (168 F. (2d) 276.)

In addition to the cases noted above, the decisions of the Court of Appeals for the Sixth Circuit in *Raulins vs. Memphis Union Station Co.*, 168 F. (2d) 466, and of the Court of Appeals for the Fifth Circuit in *Harvey vs. Braniff International Airways*, 164 F. (2d) 521, previously relied upon by petitioner herein also adopted the furlough or leave of absence test, and stand in conflict with the decision of the Court of Appeals below. We also direct the Court's attention to the District Court decision in the case of *Huffman vs. Norfolk & Western Ry. Co.*, 71 F. Supp. 564, not previously relied upon by petitioner. The opinion in that case contains an excellent discussion of the question of statutory interpretation here involved, and adopts the furlough or leave of absence principle in determining the rights of the returning veteran.

The decisions of the Courts of Appeals for the Second, Fifth, Sixth, Eighth, and ~~Tenth~~ NINTH Circuits, which we have cited above, stand directly in conflict with the decision of the Court of Appeals below. We believe that those decisions are sound and that the Court below was in error, and that the conflict thus presented should be resolved by this Court.

CONCLUSION

We have examined the brief heretofore filed by counsel for respondent in opposition to the petition for writ of *certiorari*. In that brief it is argued that the decision of the Court of Appeals below is consistent with other decisions adopting the furlough or leave of absence test which we have discussed. We can see no basis whatsoever for that argument. Both courts below clearly held that the respondent was entitled by the Act to receive the position and seniority as a train dispatcher which he would have attained had he not been absent in the armed forces, and that he was to be legally excused for not having done what would have been necessary to obtain that position and seniority had he remained in the employ of petitioner. The adoption of this principle completely destroys any distinction between the status of an employee returning from furlough or leave of absence, and that of one who has remained at service in the plant. If this principle were applied to the cases cited in our argument, the decisions in those cases would have to be reversed.

We have pointed out that the question involved in this case is of widespread importance, and has given rise to numerous disputes affecting seniority rights of thousands of employees, both within and without the railroad industry. At least insofar as the railroad industry is concerned, it is the basis for the majority of the pending and prospective litigation with respect to reemployment rights under the Selective Training and Service Act. In the argument herein, we have shown that the decision of the Court of Appeals below is diametrically opposed to the express provisions of the Act, and is in conflict with decisions of other courts involving the same question.

For the reasons stated above, it is therefore respectfully submitted that the petition for rehearing should be granted, and the question presented should be considered and decided by this Court.

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CERTIFICATE OF SERVICE

I, Frank L. Mulholland, one of the attorneys for the American Train Dispatchers Association, do hereby certify that on the 16th day of May, 1949, I served the attached motion for leave to file brief as *amicus curiae* and brief of *amicus curiae* in support of petition for rehearing upon all parties of record herein by depositing copies thereof in the United States mails, postpaid, addressed to Albert H. Cole, attorney for petitioner, at Peru, Indiana, and H. K. Cuthbertson, attorney for respondent, at Peru, Indiana.

FRANK L. MULHOLLAND.